

Azizan bin Saad v Public Prosecutor**A**

HIGH COURT (TEMERLOH) — CRIMINAL REVISION NO 43-01 OF 2000
NIK HASHIM J
25 FEBRUARY 2000

Criminal Procedure — Sentence — Concurrent or consecutive — Plea of guilty — Accused already serving sentence for term of imprisonment for unrelated offence — Sentence of imprisonment handed down — Direction made on warrant of commitment that sentence was to take effect after expiration of other sentence of imprisonment — Direction not pronounced in open court and recorded in notes of proceedings — Whether direction valid

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The accused pleaded guilty to being in possession of 0.5g of heroin and was sentenced to 12 months imprisonment under s 12(3) of the Dangerous Drugs Act 1952. The sessions court judge, sitting as a magistrate, made a direction on the warrant of commitment ('WC') that the sentence was to take effect after the expiration of the sentence of 42 months imprisonment which was handed down on 18 November 1999 in a separate case in Kuala Lumpur. The accused applied for the revision of the direction of the court on the warrant of commitment on the grounds that it was not valid as it was not pronounced and recorded in the notes of the learned judge during the proceedings in open court. The deputy public prosecutor however contended that the direction was valid and that the learned judge's omission did not occasion a failure of justice and was hence curable under s 422 of the Criminal Procedure Code ('the CPC').

C**D****E**

Held, allowing the application for revision and ordering that the sentence commence from the date of sentencing:

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- (1) Pursuant to ss 282(d) and 292(i) of the CPC, the court in suitable cases may direct that the term of imprisonment take effect at the expiration of the imprisonment to which the accused had been previously sentenced. The word 'direct' in both sections implied that the direction, if made, must be made and declared in the open court in the presence and hearing of the parties in the proceeding, and the court making the direction must record it clearly in the judgment notes. Any direction made 'outside' the judgment notes is not a direction made in accordance with the sections, and therefore was invalid and unenforceable in law (see p 137F-H).

G**H**

- (2) The WC was a committing document empowering the prison authorities to receive and imprison the accused person. It was therefore very important to ensure that the entries in the WC were not inconsistent with the sentence passed. In this case, no direction like the one written on the WC was ever recorded in the judgment notes and there was no indication whatsoever that the sentence was to run consecutive to the 42 months imprisonment imposed by the Kuala Lumpur court (see pp 137H-138A).

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- A (3) The learned judge became functus officio after the sentence was passed and could not add, alter the judgment or make the order on the WC directing that the accused serve the present term of imprisonment consecutive to the one he had been previously sentenced. Though the WC was signed by the judge, the direction on the WC was not part of her judgment when she passed the sentence in court (see p 138B-C).
- B
- (4) If the failure of the judge to state the direction in her judgment notes amounted to an omission, it was not a mere irregularity but an omission which had occasioned a failure of justice to the detriment of the accused and was not curable under s 422 of the CPC (see p 138D).
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[Bahasa Malaysia summary]

- D Tertuduh telah mengaku salah kerana memiliki 0.5g heroin dan telah dihukum 12 bulan penjara di bawah s 12(3) Akta Dadah Merbahaya 1952. Hakim mahkamah sesyen, yang duduk sebagai majistret, telah membuat satu arahan atas waran pemenjaraan ('WP') bahawa hukuman tersebut mula berkuat kuasa selepas tamat tempoh hukuman 42 bulan penjara yang telah diumumkan pada 18 November 1999 di dalam satu kes berasingan di Kuala Lumpur. Tertuduh telah memohon satu penyemakan ke atas arahan mahkamah tersebut atas waran pemenjaraan dengan alasan bahawa ia tidak sah kerana tidak diumumkan dan direkodkan di dalam nota-nota hakim yang arif semasa prosiding di mahkamah terbuka. Timbalan pendakwa raya bagaimanapun menegaskan bahawa arahan tersebut adalah sah dan bahawa peninggalan hakim yang arif tidak menyebabkan satu kegagalan keadilan dan oleh itu boleh dipulihkan di bawah s 422 Kanun Acara Jenayah ('KAJ').
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Diputuskan, membenarkan permohonan untuk penyemakan dan mengarahkan bahawa hukuman bermula daripada tarikh penghukuman:

- G (1) Menurut ss 282(d) dan 292(i) KAJ, mahkamah di dalam kes-kes yang sesuai boleh mengarahkan tempoh pemenjaraan mula berkuat kuasa pada tempoh tamat pemenjaraan di mana tertuduh telah sebelumnya dijatuhkan hukuman. Perkataan 'arahan' di dalam kedua-dua seksyen menandakan bahawa arahan tersebut, jika dibuat, sepatutnya dibuat dan diumumkan di mahkamah terbuka dengan kehadiran dan didengari pihak-pihak di dalam prosiding tersebut, dan mahkamah yang membuat arahan tersebut sepatutnya merekodkannya dengan jelas di dalam nota-nota penghakiman. Apa-apa arahan yang dibuat 'di luar' nota-nota penghakiman bukan satu arahan yang dibuat menurut seksyen-seksyen tersebut, dan oleh itu adalah tidak sah dan tidak boleh dikuat kuasakan oleh undang-undang (lihat ms 137F-H).
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- (2) WP tersebut adalah satu dokumen pemenjaraan yang memberikan kuasa kepada pihak berkuasa penjara untuk menerima dan memenjarakan seorang tertuduh. Oleh demikian adalah amat penting untuk memastikan bahawa kemasukan di dalam WP tersebut adalah konsisten dengan hukuman yang dijatuhkan. Di dalam kes ini, tiada arahan seperti yang tertulis atas WP tersebut telah direkodkan langsung di dalam nota-nota penghakiman tersebut dan tiada tanda apa sekalipun menunjukkan bahawa hukuman tersebut sepatutnya berjalan secara konsekutif dengan 42 bulan penjara yang dikenakan oleh mahkamah Kuala Lumpur (lihat ms 137H–138A). A
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- (3) Hakim yang arif menjadi *functus officio* setelah hukuman diberikan dan tidak boleh menambah, menukar penghakiman atau membuat perintah atas WP tersebut dengan mengarahkan tertuduh menjalani tempoh pemenjaraan konsekutif kepada yang satu lagi di mana beliau telah sebelumnya dihukum. Walaupun WP telah ditandatangani oleh hakim tersebut, arahan atas WP tersebut bukanlah sebahagian daripada penghakiman beliau semasa beliau menjatuhkan hukuman di mahkamah (lihat ms 138B–C). C
D
- (4) Sekiranya kegagalan hakim untuk menyatakan arahan di dalam nota-nota penghakiman beliau membentuk satu peninggalan, ia bukan hanya satu luar aturan tetapi satu peninggalan yang telah menyebabkan satu kegagalan keadilan yang menjejaskan tertuduh dan tidak boleh dipulihkan di bawah s 422 KAJ (lihat ms 138D).] E

Notes F

For cases on concurrent or consecutive sentence, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2570–2599.

Legislation referred to G

Criminal Procedure Code (FMS Cap 6) ss 282(d), 278, 292(i), 422
Dangerous Drugs Act 1952 s 12(2), (3)

Richard Bong (Bong & Co) for the accused.

Iskandar Ali bin Dewa (Deputy Public Prosecutor) for the prosecution. H

Nik Hashim J: Following his guilty plea, the accused person was convicted for an offence of having in his possession 0.5g of heroin under s 12(2) of the Dangerous Drugs Act 1952 ('the Act') and was sentenced on 22 December 1999 to 12 months imprisonment under s 12(3) of the same Act. The learned sessions court judge, sitting as a magistrate, however, made a direction on the warrant of commitment ('WC') that the sentence of imprisonment was to take effect after the expiration of the 42 months imprisonment imposed on 18 November 1999 vide Kuala Lumpur case no I

- A D81-39-1999. The WC, which was signed by the learned judge, bore the following direction note at the top of the warrant:

Hukuman berjalan selepas menjalani hukuman penjara bagi kes D81-39-1999 s 12(2) Akta Dadah Berbahaya 1952 — Kuala Lumpur.

- B Dissatisfied with the direction on the WC, the learned counsel who represented the accused before the learned judge, applied to this court to revise the direction on the ground that it was not valid as it was not pronounced and recorded in the notes of the learned judge during the proceeding in the open court.

- C The learned deputy public prosecutor, on the other hand, contended that the direction was valid. He contended that the failure on the part of the learned judge to state the direction in the proceeding notes and to pronounce it in the open court was only an omission which occasioned no failure of justice and hence curable under s 422 of the Criminal Procedure Code (FMS Cap 6) ('CPC').

- D The issue in this case is whether the direction on the WC is valid in the circumstances.

The relevant provisions relating to the commencement of sentence of imprisonment are as follows:

Section 282(d) of the CPC states:

- E ... every sentence of imprisonment shall take effect from the date on which the same was passed *unless the court passing sentence otherwise directs*.

whereas s 292(i) says:

- F when a person ... is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, *as the court awarding the sentence may direct ...* (Emphasis added).

- G The phrases '*unless the court passing sentence otherwise directs*' under s 282(d) and '*as the court awarding the sentence may direct*' under s 292(i) of the CPC are similar in effect in that, unless the sentencing court otherwise directs, every sentence of imprisonment shall commence immediately ie on the same date on which the sentence was passed. So, the court in suitable cases may direct that the present term of imprisonment to take effect at the expiration of the imprisonment to which the accused has been previously sentenced. In my view, the word '*direct*' in both sections implies that the direction, if made, must be made and declared in the open court in the presence and hearing of the parties in the proceeding, and the court making the direction must record it clearly in the judgment notes. Any direction made 'outside' the judgment notes is not a direction made in accordance with the sections, and therefore is invalid and unenforceable in law.

- H The WC is a committing document empowering the prison authorities to receive and imprison the accused person. It is therefore very important to ensure that the entries in the WC are not inconsistent with the sentence passed. In this case, there was no such direction like the one written on the WC was ever recorded in the judgment notes. What was stated in the
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judgment notes of the learned judge is that upon his plea of guilty and mitigation by counsel and the address by the prosecuting officer, the accused was only sentenced to 12 months imprisonment with no indication whatsoever that the sentence was to run consecutively to the 42 months imprisonment imposed by the Kuala Lumpur court.

The learned judge is bound by her decision, and in the present case, she became *functus officio* after the sentence was passed. Unless it is a clerical error which may be rectified, which is not the case here, she cannot add or alter her judgment (see s 278 of the CPC). If she really intends at the time of passing the sentence that the sentence of imprisonment is to run consecutively, then she has to say so in the open court and express it clearly in her judgment notes. Otherwise, the sentence of imprisonment runs from the date on which the sentence was passed. Thus, the learned judge cannot make the order on the WC directing the accused person to serve the present term of imprisonment consecutively to the one he has been previously sentenced. Though the WC was signed by her, the direction on the WC is not part of her judgment when she passed the sentence in court.

If indeed the failure of the learned judge to state the direction in her judgment notes amounts to an omission, as contended by the learned deputy public prosecutor, then the omission, to my mind, is not a mere irregularity but an omission which has occasioned a failure of justice to the detriment of the accused which is not curable under s 422 of the CPC. The direction on the WC has no legal basis and as such, it should be set aside.

Therefore, on revision, I ordered that the WC be cancelled and a new one be issued instead minus the direction. The accused person is to serve the 12 months imprisonment from the 22 December 1999, the date on which the sentence was passed.

Application allowed.

Reported by Chin En Tek

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